

DISTRICT OF NEVADA

Plaintiff,

TROPICANA LAS VEGAS, INC.,

RKF RETAIL HOLDINGS, LLC,

VS.

Defendant.

Case No. 2:15-cv-01446-APG-GWF

Re: Motion to Compel (ECF No. 101)

2017. Defendant Eastern filed its Opposition (ECF No. 106) on May 4, 2017. Plaintiff filed its Reply

BACKGROUND

Plaintiff RKF Retail Holdings, LLC (“RKF”) and Defendant Tropicana Las Vegas, Inc.

(“Tropicana”) entered into an Exclusive Agency Agreement (“Agreement”) on August 29, 2012 relating

1 to a planned retail shopping center to be constructed on the grounds of Tropicana's hotel/casino
2 property in Las Vegas, Nevada. *Motion to Compel* (ECF No. 101), *Exhibit 1, Agreement*. Pursuant to
3 the Agreement, Tropicana granted RKF the exclusive right as broker to lease space to prospective
4 tenants in the shopping center "Premises" which was in the design development stage. *Id.* at ¶ 1. RKF
5 was to use its best efforts to market the shopping center to prospective tenants consistent with a first
6 class retail shopping mall. *Id.* at ¶ 2. The initial term of the agreement was one year, commencing on
7 September 15, 2012. *Id.* at ¶ 1. The Agreement provided that RKF would be paid commissions on
8 tenant leases as follows: 50% upon execution of a lease or the first construction draw whichever
9 occurred later, and 50% upon the tenant opening for business at the shopping center premises. *Id.* at ¶ 6.
10 If no lease was executed, then no commission would be deemed earned by RKF, and it would not be
11 entitled to any payment from the Owner other than for preparing marketing materials. *Id.* at ¶ 7.

12 The Agreement provided four methods by which it could be terminated. First, the Agreement
13 could be terminated after one year by either party on thirty days written notice. *Id.* at ¶ 1. Second, it
14 could be immediately terminated if the Owner decided to cease its efforts in designing and developing
15 the shopping center project. The Agreement would be automatically re-instated for a six (6) month
16 period, however, if the Owner elected to start the project again within six (6) months after ceasing its
17 efforts. *Id.* Third, the Owner could terminate the agreement if it entered into any sale, merger,
18 acquisition, assignment or other disposition involving the Owner or the Premises. Upon termination for
19 this reason, neither the Owner or its successor would have any further liability to RKF except to the
20 extent that (i) commissions had been earned but not yet paid and (ii) the prospective tenant list pursuant
21 to Section 18 was assumed by the successor in writing. If the prospective tenant list was not assumed by
22 the successor, then the Owner would remain responsible for payment of commissions to RKF in
23 accordance with Section 18. *Id.* at ¶ 8. Fourth, the Agreement could be terminated upon a default by
24 RKF that was not cured within thirty 30 days following notice by the Owner. In the event of termination
25 for default, RKF would not be entitled to any commissions, except to the extent that any commissions
26 had been earned prior to termination in connection with any lease that has been fully executed and
27 delivered by the parties. *Id.* at ¶ 11.

28 . . .

Paragraph 18 of the Agreement stated as follows:

Prospective Tenant List. Within fifteen (15) days after the expiration or effective date of termination of this Agreement, RKF shall submit to Owner a Prospective Tenant List (hereinafter the "List"), which shall be limited to prospective tenants that have either (i) visited the property where the Premises will be located with intent to lease space therein and expressed interest in writing (email included) in leasing space therein, or (ii) submitted or received a bona fide offer, bona fide letter of intent or bona fide written lease proposal during the term hereof. If, within six (6) months after the expiration or effective date of termination of this Agreement, Owner enters into a transaction with any Tenant included on the List, Owner agrees to pay RKF the Commission as outlined herein (plus any Option Commissions or Expansion Commissions if applicable), in accordance with the terms hereof.

Notwithstanding the foregoing, if at the end of such six (6) month period, Owner and a Tenant on the List are negotiating in good faith, then such six (6) month period shall be extended to the earlier of (a) the date on which the transaction is executed and (b) the date on which such good faith negotiations end without the transaction having been executed. This paragraph shall survive the expiration or termination of this Agreement, including as it may relate to any Transfer. In the event the Owner enters into a Transfer Agreement, Owner shall use commercially reasonable efforts to enter into an Assumption Agreement, a copy of which shall be sent to RKF within five (5) days of the effective date of the Transfer. Any Transfer shall not release Owner of the obligation under this paragraph unless the Transferee enters into an Assumption Agreement.

Agreement, (ECF No. 101), *Exhibit 1*, ¶ 18.

On March 26, 2014, Tropicana sent a letter to RKF terminating the Agreement, effective immediately. *Tropicana's Opposition* (ECF No. 113), *Exhibit A*. Tropicana stated that it was terminating the Agreement, under Section 1. It also stated that it was terminating the Agreement under Section 11 due to the numerous defaults by RKF, some of which it identified in the letter. Tropicana stated that it was making the termination effective immediately to avoid exposing it to further harm and additional damages resulting from RKF's numerous defaults. *Id.* On April 8, 2014, RKF sent a letter to Tropicana reiterating its position that Tropicana had improperly and unlawfully terminated the Agreement. With its letter, RKF provided "a list of prospective tenants for the Premises that are the subject of the agency agreement." *Motion to Compel* (ECF No. 101), *Exhibit 2*.

RKF filed its complaint against Tropicana on July 28, 2014. RKF alleged that it performed substantial work to market the project and obtain letters of intent from prospective tenants, and performed other services outside the scope of the Agreement to assist Tropicana in developing the

1 project. It alleged that Tropicana “had no intention of immediate development of the Premises, but
2 rather procured RKF’s services in marketing and cultivating interest in its potential development by
3 means of fraudulent misrepresentations of fact.” RKF alleges causes of action against Tropicana for
4 fraudulent inducement,¹ fraudulent concealment, breach of contract, contractual and tortious breach of
5 the covenant of good faith and fair dealing, and unjust enrichment/quasi-contract. Tropicana filed a
6 counterclaim on September 4, 2014, alleging that RKF misrepresented its ability to secure tenants for the
7 proposed shopping center, and that had it known the true extent of RKF’s experience and contacts, it
8 would not have hired it. Tropicana alleges claims against RKF for fraudulent inducement, breach of
9 contract, breach of the implied covenant of good faith and fair dealing, intentional and negligent
10 interference with prospective economic advantage, and negligence.

11 On July 29, 2015, RKF filed a separate lawsuit against Eastern Real Estate, LLC, (“Eastern”)
12 which alleged that Eastern induced and conspired with Tropicana to terminate RKF’s exclusive agency
13 contract so that Tropicana and Eastern could then proceed with the development. RKF alleges claims
14 against Eastern for tortious interference with contractual relations and prospective business relations, and
15 aiding and abetting breach of fiduciary duty.²

16 The Tropicana was acquired by Penn National Gaming, Inc. on August 25, 2015. On September
17 16, 2015, Tropicana sent a letter to RKF stating: “Based on our telephone discussions last month, I know
18 you are aware that Penn National Gaming, Inc. (“Penn”) agreed to buy the Tropicana. That transaction
19 has now closed, and Penn is now the owner of the Tropicana.” *Tropicana’s Opposition* (ECF No. 113),
20 *Exhibit D*. Tropicana quoted paragraph 8 of the Agreement regarding termination upon a transfer or sell
21 of the Owner or the Premises and asserted that provision as an additional ground for terminating the
22 Agreement. Tropicana, however, stood by its earlier termination of the Agreement on March 26, 2014.

23 RKF claims that but for Tropicana’s and Eastern’s wrongful conduct, it would have earned six
24 million dollars (\$6,000,000.00) in commissions once the shopping center was completed and tenants
25

26 ¹RKF states in its opposition to Defendants’ motions for summary judgment that it is dropping the
27 fraudulent inducement claim.

28 ²These actions were consolidated on May 10, 2016.

1 began operating their businesses. Tropicana has asserted throughout this litigation that it ceased
2 development of the shopping center, and RKF therefore cannot prove any alleged loss of commissions.
3 The evidence shows that on July 7, 2014, Eastern notified Tropicana that it had decided to withdraw
4 from the project. *Opposition to Motion for Summary Judgment* (ECF No. 137), *Exhibit 84*. Brian Kelly
5 of Eastern testified, however, that Onex (Tropicana's parent) "asked us to come back to the project and
6 we came back to the project and started again, but we never completed any sort of venture."
7 *Tropicana's Opposition to Motion to Compel* (ECF No. 113), *Exhibit E*, Kelly deposition, pg. 125. Mr.
8 Kelly stated that Eastern finally withdrew from the project in June 2015. Raymond Murphy of Eastern
9 testified that Eastern's involvement in the project ended when the Tropicana was sold to Penn Gaming
10 which may have been in or about June 2015. *Opposition* (ECF No. 113), *Exhibit F*. He further testified
11 that Eastern "[was] working under a predevelopment agreement to see if there was a way to make this
12 project viable, financially/physically, and then we were notified that Penn Gaming was buying
13 Tropicana, the project was no longer there for us to work on." *Id.* at Murphy deposition, pgs. 47-48.

14 Jim Reuter, an employee of Atlantic Retail which worked as the leasing agent for Eastern on the
15 project, testified that "the deal had been on and off a couple of times, so I think there was a feeling that
16 there was a possibility that the deal may be resurrected." *Opposition* (ECF No. 113), *Exhibit G*, Reuter
17 deposition, pg. 226. He could not recall the exact date that Atlantic completely stopped working on the
18 project, but believed it was prior to November 1, 2015. *Id.* at pgs 226-27. He further stated "I don't
19 know if it was June or July of 2015." *Id.* at pg. 227. Mr. Reuter was not aware at the time of his April 4,
20 2017 deposition of any ongoing plans to develop a shopping center on the property. *Id.* at pg. 208.

21 Bryan Anderson of Atlantic testified that Atlantic's involvement ended "[w]henver Eastern's
22 involvement ended." *Opposition* (ECF No. 113), *Exhibit H*, Anderson deposition, pg. 46. He stated that
23 Atlantic stopped working on the project when it was announced that Penn Gaming had purchased the
24 property. *Id.* at pg. 147. He testified that Eastern reached out to Penn National Gaming to see if it could
25 continue as a joint venture partner with it on the project. *Id.* at pg.154. Mr. Anderson was also unaware,
26 at the time of his April 5, 2017 deposition whether there are current plans to develop a shopping center
27 on the property. *Id.* at pgs 77-78.

28 Tropicana's general counsel Joanne Beckett testified that she did not know "if Penn Gaming in

1 connection with its acquisition of Tropicana ever contemplated pursuing the development.” *Opposition*
2 (ECF No. 113), *Exhibit I*, Beckett deposition, pg. 136. She was not privy to any conversations that
3 Tropicana’s former president, Alex Yemenidjian, may have had with Penn Gaming regarding the
4 continued pursuit of the shopping center project after the acquisition. She did not hear of any such
5 plans. *Id.* at pgs 306-07.

6 RKF states that on March 31, 2017, it learned of the existence of “Penn Gaming/Tropicana
7 documents showing that they fully intended to develop the Premises and had simply hid the continuing
8 development plans from discovery.” *Motion to Compel* (ECF No. 101), at pg. 2. RKF states that it
9 received an email from a Las Vegas broker inquiring about RKF’s interest in providing prospective
10 tenants for a shopping center development on the Tropicana property. The broker attached a “‘Master
11 Plan and renderings for the Tropicana retail expansion’ reflecting ongoing efforts to develop the
12 Premises as a retail shopping center.” *Id.* at pg. 7. *See Declaration of RKF’s Counsel, Ross Bagley*
13 (ECF no. 103), *Exhibit D*. The drawings or renderings prepared by Marnell Architecture are dated
14 November 2016. *Id.* In light of this information, RKF moves to compel Tropicana to supplement its
15 previous responses to requests for production of documents. Specifically, RKF argues that Tropicana
16 should be ordered to supplement its responses to the following requests for production in RKF’s first set
17 of requests:

18 Request No. 2: All documents concerning the Premises, including but not
19 limited to development of the Premises;³

20 Request NO. 7: All documents concerning representations made by
21 Tropicana concerning the development of the Premises, including but not
22 limited to documents concerning the timeline for development, the
23 intention to develop and efforts toward development;

24 Request No. 9: All documents concerning Tropicana’s conduct in
25 connection with development of the Premises; and

26 Request No. 16: All documents concerning prospective or potential
27 tenants of the Premises.

28 ³RKF’s motion refers to this request as Request No. 1. However, the quoted request is Request No. 2.
see Declaration (ECF no. 103), *Exhibit A*.

1 *Motion to Compel* (ECF No. 101), pg. 6; *Declaration of RKF's Counsel, Ross Bagley* (ECF No.
2 103), *Exhibit D*.

3 Discovery closed on April 10, 2017. Without first moving to extend discovery, RKF served the
4 following additional requests for production on Tropicana on April 4, 2017:

5 1. All documents concerning the Premises, including but not limited to
6 any architectural and/or written plans and renderings prepared by or with
7 Marnell Architecture or any other architecture firm concerning the
8 development of the Premises. . . .

9 2. All documents concerning the potential development of the Premises
10 for use other than that of retail space, including but not limited to the use
11 of the Premises as; (i) a single tenant restaurant space, (ii) exhibit space;
12 (iii) convention space; and (iv) multi-tenant food and beverage space. . . .

13 3. All documents concerning teleconferences or meetings with Marnell
14 Architecture, The McGarey Group, or any other architects and/or brokers
15 concerning the Premises involving Tropicana and/or Penn Gaming. . . .

16 4. All documents concerning Tropicana's and/or Penn Gaming's conduct
17 in connection with the development of the Premises, including but not
18 limited to (i) efforts to obtain financing or (ii) contact with real estate
19 brokers, developers, potential tenants, agents or other third parties. . . .

20 5. All documents concerning teleconferences, meetings, or
21 communications between Tropicana, Penn Gaming or any other third party
22 concerning any decision to develop – or not develop – the Premises in
23 2017 or thereafter.

24 6. All documents concerning the announcement of any initial or updated
25 development plans for a retail development project involving the
26 Premises. . . .

27 *Declaration of RKF's Counsel, Ross Bagley* (ECF no. 103), *Exhibit E*.

28 RKF states that documents responsive to Request Nos 1, 2, 3, 4, and 6 should have been
produced in supplemental responses to it prior requests. *Id*.

 On April 4, 2017, RKF's lawyer also sent a letter to Tropicana's lawyer advising that "RKF has
just become aware . . . that continuing plans for the continued development o the Premises are ongoing
and that Tropicana possesses responsive documents concerning the continued development of the
Premises that have not yet been produced." RKF asserted that Tropicana had a duty to produce such
documents as a supplement to its responses to prior requests. *Declaration of RKF's Counsel, Ross
Bagley* (ECF no. 103), *Exhibit F*. On April 7 and 20, 2017, RKF also served a subpoena duces tecum

1 and an amended subpoena duces tecum on Penn National Gaming, Inc. seeking the same documents set
2 forth in the requests for production to Tropicana. *Declaration of RKF's Counsel, Ross Bagley* (ECF no.
3 103), *Exhibit I*. The subpoena also seeks:

4 5. All documents concerning the activities of Penn Gaming's Board of
5 Directors ("Board") in connection with the development of the Premises,
6 including but not limited to communications between members of the
7 Board; communications between any members of the Board and any other
8 third party; plans, presentations, surveys, reports, financials or other
9 material submitted to the Board; votes of the Board; minutes of meetings
10 of the Board; or resolutions or actions taken by the Board.

11 *Id.*

12 RKF also moves to reopen discovery to obtain additional information about Penn Gaming's
13 shopping center development plans.

14 Tropicana argues that Penn Gaming's current development plans for the property are new and
15 independent of the shopping center project that was pursued by Tropicana prior to Penn Gaming's
16 acquisition of the property. It argues that Penn Gaming's current plans provide for a significantly
17 smaller retail shopping area as a component of an overall plan to remodel the main entrance and casino
18 area. It argues that these plans are irrelevant to the claims and defenses in this action and need not be
19 produced. Tropicana further argues that RKF's sixth set of request for production are improper and
20 untimely because they were served less than one week before the discovery cut-off date. It also argues
21 that the subpoena served on Penn Gaming is untimely because it was served after discovery closed.
22 Tropicana also argues that RKF unreasonably waited until May 1, 2017 to file its motion to compel and
23 to reopen discovery.

24 **DISCUSSION**

25 **1. Timeliness of Plaintiff's Motion to Compel and to Reopen Discovery.**

26 Defendants argue that RKF's motion to compel and to reopen discovery should be denied on
27 grounds of untimeliness. In *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D.Nev. 1999), the court
28 noted that "the Federal Rules of Civil Procedure and the Local Rules of this district do not specify a time
limit for filing a motion to compel." Eighteen years after *Gault*, that statement is still true. *Gault* stated
that a motion to compel may be filed after the close of discovery, and that absent unusual circumstances,
it should be filed before the scheduled date for dispositive motions. The statements in *Gault* are only

1 general guideposts, not bright-line rules. *Williams v. Las Vegas Metropolitan Police Dept.*, 2015 WL
2 3489553, at *1 (D. Nev. June 3, 2015). The timeliness of a motion to compel must be determined based
3 on the circumstances specific to that case. *Id.* A motion to compel filed on the last day of discovery, for
4 example, may be untimely if it could and should have been filed much earlier. *E.E.O.C. v. Pioneer*
5 *Hotel, Inc.*, 2014 WL 5045109, at *1-2 (D.Nev. Oct. 9, 2014). This Court and others have looked to the
6 non-exhaustive list of factors set forth in *Days Inn Worldwide, Inc. v. Sonia Investments*, 237 F.R.D.
7 395, 398 (S.D. Tex. 2006), in analyzing the timeliness of a motion to compel. The factors include: (1)
8 the length of time since the expiration of the deadline; (2) the length of time the moving party has known
9 about the discovery; (3) whether the discovery deadline has been previously extended; (4) the
10 explanation for the tardiness or delay; (5) the age of the case; (6) prejudice to the party from whom
11 discovery is sought; and (7) disruption of the court's schedule.

12 RKF states that it first learned of Penn Gaming's current development plans at the end of March
13 2017. Upon learning about Penn Gaming's development plans, RKF promptly notified Tropicana of its
14 duty to supplement its prior discovery responses and also served its sixth set of request for production of
15 documents. Although RKF arguably should have moved to extend the April 10th discovery deadline
16 before it expired, and should have obtained such an extension before it served its sixth set of requests for
17 production,⁴ RKF did not engage in unnecessary delay under the circumstances. The fact that RKF's
18 motion was filed 20 days after the discovery deadline expired was also not unreasonable given that RKF
19 learned of Penn Gaming's development plans less than two weeks before the expiration of discovery.⁵
20

21 ⁴Written discovery requests are untimely if they are not served at least 30 days before the discovery cut
22 off date. *Collins v. Landry's Inc.*, 2015 WL 3505315, at *2 (D.Nev. June 3, 2015) (citing *Bishop v. Potter*, 2010
23 WL 2775332, at *1 (D.Nev. July 14, 2010)). Thus, absent an order extending the discovery period or shortening
the time for response, Tropicana was not required to respond to RKF's sixth set of requests for production.

24 ⁵Based on the present record, the Court rejects RKF's assertion that Tropicana and Penn Gaming
25 intentionally concealed Penn Gaming's development plans in an attempt to prevent RKF from obtaining
26 admissible evidence. First, as discussed hereafter, there is a reasonable argument that Penn Gaming's current
27 development plans are substantially different from the prior shopping center project, and therefore irrelevant to
the claims and defenses in this case. Second, neither RKF or the Court knows when Penn Gaming began its plans
28 to further develop the Tropicana property. Third, Penn Gaming has made its development plans public to those
who may be interested in leasing or providing prospective tenants for the development— which is how RKF
learned of the plans.

1 Tardiness or delay, therefore, is not valid ground upon which to deny RKF's motion to compel or to
2 reopen discovery.

3 **2. Relevance and Proportionality.**

4 Rule 26(b)(1) of the Federal Rules of Civil Procedure, as amended in 2015, provides that
5 "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim
6 or defense and proportional to the needs of the case, considering the importance of the issues at stake in
7 the action, the amount in controversy, the parties' relative access to relevant information, the parties'
8 resources, and the importance of the discovery in resolving the issues, and whether the burden and
9 expense of the proposed discovery outweighs its likely benefit. Information within the scope of
10 discovery need not be admissible in evidence to be discoverable."

11 The intent of the 2015 amendments to Rule 26(b) was to encourage trial courts to exercise their
12 broad discretion to limit and tailor discovery to avoid abuse and overuse, and to actively manage
13 discovery to accomplish the goal of Rule 1 "to secure the just, speedy, and inexpensive determination of
14 every action and proceeding." *Roberts v. Clark County School District*, 312 F.R.D. 594, 601–04 (D.
15 Nev. 2016). The court, quoting Chief Justice Roberts' 2015 Year-End Report, states:

16 The 2015 amendments to Rule 26(b)(1) emphasize the need to impose
17 "reasonable limits on discovery through increased reliance on the
18 common-sense concept of proportionality." The fundamental principle of
19 amended Rule 26(b)(1) is "that lawyers must size and shape their
20 discovery requests to the requisites of a case." The pretrial process must
provide parties with efficient access to what is needed to prove a claim or
defense, but eliminate unnecessary and wasteful discovery. This requires
active involvement of federal judges to make decisions regarding the
scope of discovery.

21 *Roberts*, 312 F.R.D. at 603. See also *Nationstar Mortgage v. Flamingo Trails No. 7*, 316 F.R.D.
22 327, 331 (D.Nev. 2016).

23 In *In re Bard IVC Filters Products*, 317 F.R.D. 562, 563 (D.Ariz. 2016), the court noted that
24 prior to the 2015 amendments, Rule 26(b) provided that inadmissible evidence was discoverable if it
25 "appears reasonably calculated to lead to the discovery of admissible evidence" and that some courts,
26 and many lawyers, used this language to define the scope of discovery. The 2015 amendments
27 eliminated the "reasonably calculated" language and replaced it with the more direct declaration that
28 "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

1 *Id.* at 563 (quoting rule). *Bard* states:

2 Relevancy alone is no longer sufficient—discovery must also be
3 proportional to the needs of the case. The Advisory Committee Note
4 makes clear, however, that the amendment does not place the burden of
5 proving proportionality on the party seeking discovery. The amendment
6 “does not change the existing responsibilities of the court and the parties
7 to consider proportionality, and the change does not place on the party
8 seeking discovery the burden of addressing all proportionality
9 considerations.” Rule 26, Advis. Comm. Notes for 2015 Amends. Rather,
10 “[t]he parties and the court have a collective responsibility to consider the
11 proportionality of all discovery and consider it in resolving discovery
12 disputes.”

13 *Bard*, 317 F.R.D. at 564.

14 Generally, the party opposing discovery has the burden of showing that it is irrelevant, overly
15 broad, or unduly burdensome. *Graham v. Casey’s General Stores*, 206 F.R.D. 251, 253-4 (S.D.Ind.
16 2000); *Fosbre v. Las Vegas Sands Corp.*, 2016 WL 54202, at *4 (D.Nev. Jan. 5, 2016); *Izzo v. Wal-Mart*
17 *Stores, Inc.*, 2016 WL 593532, at *2 (D.Nev. Feb. 11, 2016). When a request is overly broad on its face
18 or when relevancy is not readily apparent, however, the party seeking discovery has the burden to show
19 the relevancy of the request. *Desert Valley Painting & Drywall, Inv. v. United States*, 2012 WL
20 4792913, at *2 (D.Nev. Oct. 9, 2012) (citing *Marook v. State Farm Mut. Auto. Ins. Co.* 259 F.R.D. 388,
21 394-95 (N.D. Iowa 2009)). The 2015 amendments to Rule 26(b) have not changed these basic rules,
22 although they must now be applied with a greater degree of analysis and emphasis on proportionality.

23 RKF alleges that Tropicana and Eastern acted in a fraudulent and wrongful manner to remove
24 RKF as the leasing agent and prevent it from receiving the commissions to which it would be entitled.
25 Tropicana argues, however, that the shopping center was never constructed and, therefore, there are no
26 leases upon which RKF could have earned commissions. Although RKF argues that it is entitled to
27 recover the projected commissions even if the shopping center is not developed, its damages claim is
28 certainly undermined if the shopping center project was not economically viable.

Based on the evidence so far submitted, Penn Gaming’s current development plans appear to be
substantially different from the shopping center project previously pursued by Tropicana and RKF, and
then by Tropicana and Eastern. Nonetheless, RKF seeks production of all documents relating to any
development of the Tropicana property. *See e.g., Declaration of RKF’s Counsel, Ross Bagley* (ECF No.
103), *Exhibit E*, Request No. 2. These requests are overbroad on their face. A project to build or expand

1 the Tropicana's exhibit or convention space or to build a single tenant restaurant, does not appear
2 sufficiently similar to the shopping center project to justify production of all documents relating to such
3 developments. RKF is entitled to conduct limited discovery to obtain documents or information, beyond
4 that contained in *Exhibit D* to its Motion, which describe the nature of Penn Gaming's current
5 development plans for the subject property and when Penn Gaming began pursuing the current
6 development project. Such discovery may include conducting a Rule 30(b)(6) deposition of Penn
7 Gaming on these limited topics. If upon completion of this limited discovery, RKF can demonstrate that
8 there is substantial similarity between Penn Gaming's current development plans and the previous
9 shopping center project, then the Court will consider RKF's requests for production of additional
10 documents. If Penn Gaming's current development plans are, in fact, substantially different from the
11 prior retail shopping center project, then further discovery on this matter will not be authorized.

12 Counsel for the parties shall meet and confer regarding the documents or information to be
13 produced by Defendant Tropicana and/or non-party Penn National Gaming in compliance with the
14 Court's order and to schedule a Rule 30(b)(6) deposition if requested by RKF. If they are unable to
15 agree on the documents or information to be produced in compliance with this order, they should so
16 advise the Court in writing and it will schedule a hearing to resolve the dispute(s). Accordingly,

17 **IT IS HEREBY ORDERED** that Plaintiff RKF's Motion to Compel (ECF No. 101) and
18 Defendant Tropicana's Countermotion for Protective Order (ECF No. 114) are **granted**, in part, and
19 **denied**, in part, in accordance with the foregoing provisions of this order.

20 **IT IS FURTHER ORDERED** that discovery is reopened through **September 6, 2017** to
21 complete the limited discovery authorized by this order.

22 DATED this 6th day of July, 2017.

23
24 
25 GEORGE FOLEY, JR.
26 United States Magistrate Judge
27
28